

# EXHIBIT 2

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF TEXAS  
WACO DIVISION

JENS H.S. NYGAARD

\* March 22, 2021

\*

VS.

\* CIVIL ACTION NO. W-20-CV-234

\*

FEDERATION INTERNATIONALE  
DE L'AUTOMOBILE, ET AL

\*

\*

BEFORE THE HONORABLE ALAN D ALBRIGHT  
MARKMAN HEARING (ZOOM)

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27 produced by computer-aided transcription.

10:33 1 when your expert prepares his or her report and wants to say  
10:33 2 that the defendants' products infringe this element because --  
10:33 3 and that the reason why is it has everything that you have  
10:33 4 identified in your buttressing, let me tell you, you're not  
10:33 5 going to -- it's not going to hurt you for your expert to say  
10:33 6 the reason we think they infringe is because what they do reads  
10:33 7 on our preferred embodiment.

10:33 8 And so I'm not anticipating an O2 Micro issue here just  
10:33 9 because you say that it doesn't infringe because it does that.  
10:33 10 That, to me, is probably your best argument for what it's  
10:34 11 worth. And I don't care what your arguments are. That's not  
10:34 12 my role.

10:34 13 But I'm just saying that my reduction, as it were, of  
10:34 14 the preliminary construction to plain and ordinary meaning in  
10:34 15 no way prevents you, the plaintiff, from arguing that the  
10:34 16 products infringe because of exactly the way you read the plain  
10:34 17 and ordinary meaning to be.

10:34 18 So with that being said, the Court is going to adopt the  
10:34 19 construction of plain and ordinary meaning for this claim term.

10:34 20 The next claim term is "second linearly extending  
10:34 21 structural unit" and "the second structural units."

10:34 22 I'll start with the defendants since Mr. Davis has already  
10:34 23 told me that they are in agreement -- or the plaintiff is in  
10:34 24 agreement with my construction.

10:34 25 MR. RICH: Yes, Your Honor.

10:34 1 This is Harrison Rich from Baker Botts on behalf of the  
10:34 2 defendants.

10:35 3 THE COURT: Yes, sir.

10:35 4 MR. RICH: And we disagree with the Court's construction.  
10:35 5 So we would like to have a discussion about it.

10:35 6 May I proceed, Your Honor?

10:35 7 THE COURT: Oh, of course. I didn't make that clear.  
10:35 8 Yes. Of course.

10:35 9 MR. RICH: Okay. So, Your Honor, the next terms are  
10:35 10 related terms that appear in Claim 2. And the two terms are  
10:35 11 "second linearly extending structural unit" and "the second  
10:35 12 structural units."

10:35 13 And the Court adopted a plain and ordinary meaning for the  
10:35 14 preliminary construction. And defendants are going to stand on  
10:35 15 their briefing as to the indefiniteness issue for this term.  
10:35 16 But we do want to discuss the plain and ordinary meaning  
10:35 17 construction in light of the mismatch between the singular and  
10:35 18 plural usage of these terms.

10:35 19 So with that preview, I want to take a quick look at Claim  
10:36 20 2. We've highlighted the two terms that we're discussing here  
10:36 21 on Slide 44. And I want to start with the second recitation of  
10:36 22 the claim term, "the second structural units."

10:36 23 That recitation is unquestionably plural because it ends  
10:36 24 in S. And it's introduced with the article "the," meaning we  
10:36 25 have to look earlier in the claim for the antecedent. And when

10:36 1 we do that, we see that the antecedent is "second linearly  
10:36 2 extending structural unit." That's a singular recitation.

10:36 3 So the problem here is we have a plural recitation of the  
10:36 4 term, referring back to a singular recitation of the term.

10:36 5 Now, we understand from the briefing that plaintiff views  
10:36 6 the plain and ordinary meaning of both of those two terms to  
10:36 7 require plural second structural units.

10:36 8 Now, I've excerpted the relevant parts of plaintiff's  
10:36 9 brief on Slide 45. At the top of this slide we see that the  
10:37 10 plaintiff equated the third aspect of the invention to Claim 2,  
10:37 11 which is the claim that these terms appear in.

10:37 12 And then in the section where these terms were being  
10:37 13 argued, plaintiff stated that the plural usage is correct when  
10:37 14 dealing with the third aspect, which they equated to Claim 2.

10:37 15 And that's consistent with everything else that the  
10:37 16 plaintiff cited in the argument on these terms. All of the  
10:37 17 intrinsic evidence that plaintiff cited was plural usage of  
10:37 18 "second linearly extending structural units."

10:37 19 We see here on Slide 46 these are the figures that  
10:37 20 plaintiff cited in the briefing. Figure 22 on the left, we've  
10:37 21 highlighted the second structural units blue. Those are shown  
10:37 22 in plural.

10:37 23 And on the right we cited -- plaintiff cited Figure 26A.  
10:37 24 And, again, we've highlighted blue, "the second linearly  
10:37 25 extending structural units." And those are again shown in

10:38 1 plural here.

10:38 2 Same with the detailed description citations in  
10:38 3 plaintiff's brief.

10:38 4 All of those parts of the specification that were cited  
10:38 5 show plural second structural units. There are no instances in  
10:38 6 the cited parts of the specification where a singular second  
10:38 7 linearly extending structural unit is disclosed. So we  
10:38 8 understand that plaintiff has argued that the plain and  
10:38 9 ordinary meaning of these two terms refers to plural second  
10:38 10 linearly extending structural units.

10:38 11 Now, if plaintiff is going to walk away from its assertion  
10:38 12 that the plural usage is correct for these terms, we'd like to  
10:38 13 hear that now because we need to be in a position to prepare  
10:38 14 our defenses on these terms.

10:38 15 Otherwise, we're going to proceed with the understanding  
10:38 16 that these two terms require plural usage, as plaintiffs stated  
10:39 17 in the briefs.

10:39 18 THE COURT: Mr. Davis?

10:39 19 MR. DAVIS: Yes, Your Honor. Thank you for the  
10:39 20 opportunity to respond.

10:39 21 I think what our expert, Mr. Syson, said and what we cited  
10:39 22 in our brief was that a person of ordinary skill in the art  
10:39 23 would understand these terms to mean "unit" or "units." So it  
10:39 24 could be singular or plural.

10:39 25 And the figures that were shown just a moment ago are

10:39 1 embodiments from the patent. Obviously, the fact that they're  
10:39 2 embodiments doesn't mean that the claim should be limited to  
10:39 3 that. We acknowledge that there -- unfortunately, it does  
10:39 4 appear there has been a typographical error. But we think,  
10:39 5 based on our expert's testimony, that a person of ordinary  
10:39 6 skill in the art would read it that way.

10:39 7 An additional point that I will raise, Your Honor, is that  
10:39 8 looking at the claim as a whole, the inventor chose to claim  
10:39 9 that in describing the first linear extension, as saying there  
10:40 10 are at least three.

10:40 11 If, in fact, what counsel is suggesting is that there  
10:40 12 should be uniformity in how the claim is interpreted if these  
10:40 13 were meant to be purely plural, then one would have expected  
10:40 14 the claims to say at least two.

10:40 15 That's not what the claims say. They started with "unit,"  
10:40 16 singular. And the position we have taken and advocated for is  
10:40 17 that it would mean "unit" or "units."

10:40 18 We think the Court's construction -- certainly we don't  
10:40 19 think that this is indefiniteness -- indefinite. And we think  
10:40 20 that the Court's proposed construction, plain and ordinary  
10:40 21 meaning, is the right one.

10:40 22 THE COURT: Well, I understand -- here's the problem.  
10:40 23 What I don't want to have at trial is a situation where you all  
10:40 24 are arguing over what the plain language means and doesn't  
10:41 25 mean.



10:41 1 So here's what I'm going to do on this one. I'm going  
10:41 2 to -- I don't -- we did not find it indefinite. I'm not going  
10:41 3 to find it indefinite.

10:41 4 But here's what we're going to do -- here's my invitation:  
10:41 5 When the plaintiff proffers to the defense counsel its  
10:41 6 infringement contentions and takes a position with regard to  
10:41 7 infringement with respect to whether or not these claim  
10:41 8 elements are met, if there is an issue that defendants believe  
10:41 9 exists over -- which is a Markman issue, meaning you believe  
10:41 10 that the position that the plaintiff's expert or experts have  
10:41 11 taken is not the plain and ordinary meaning, as it should be  
10:41 12 understood in terms of the patent, then I want the defendants  
10:42 13 to come back at that time, and I will look and see if I find  
10:42 14 that the plaintiff -- that the plaintiff's expert's  
10:42 15 construction -- sorry -- opinion based on its construction and  
10:42 16 use of the plain and ordinary meaning of this claim term,  
10:42 17 "second linearly extending structural unit" and the "second  
10:42 18 structural units," is appropriate or not.

10:42 19 And if it is, then I will -- if I find -- if you come to  
10:42 20 me at that stage, I'll make a determination either that the  
10:42 21 plaintiff's expert is correct or, at least not correct, meaning  
10:42 22 there's infringement, just correct in terms of the use of the  
10:42 23 claim term. And I will allow, if you proceed to trial, with an  
10:42 24 understanding that the plaintiff's interpretation of plain and  
10:43 25 ordinary meaning is correct.

10:43 1 Obviously, if I find that the plaintiff has taken a  
10:43 2 position that I determined not to be the plain and ordinary  
10:43 3 meaning, given the difference between a "second linearly  
10:43 4 extending structural unit" on the one hand and the use of the  
10:43 5 word the "second structural units" on the second, then I will  
10:43 6 make my determination at that time that the plaintiff's  
10:43 7 application of plain and ordinary meaning is incorrect.

10:43 8 I don't know if that will mean the filing of a motion for  
10:43 9 summary judgment or what, but I think we're not -- we won't go  
10:43 10 to trial on this if the defendants don't want to, with the  
10:43 11 parties having a different position on what is meant by "second  
10:43 12 linearly extending structural unit" and whether it's singular  
10:43 13 or plural. Once we have the infringement opinions, I will make  
10:44 14 my determination at that time as a matter of law.

10:44 15 So I think that resolves this claim term and leaves us  
10:44 16 with the final one, which begins with "wherein the  
10:44 17 strengthening member has..." And, again, Mr. Davis told me  
10:44 18 earlier that the plaintiff is copacetic with the Court's  
10:44 19 preliminary construction. Therefore, I will hear from counsel  
10:44 20 for the defendants as to why they believe it's indefinite.

10:44 21 MS. FROST: Good morning, Your Honor. It's Claudia Frost.  
10:44 22 I'm going to argue this term for the defendants.

10:44 23 And in the brief time we have left, I'm going to focus on  
10:44 24 the limitations that are set out on Slide 53 if I can get that  
10:44 25 put up.